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August 8, 2016

VIA U.S. MAIL AND E-MAIL

Alicia Forsythe  
Bureau of Reclamation  
2800 Cottage Way, MP-170  
Sacramento, CA 95825  
E-mail: [aforsythe@usbr.gov](mailto:aforsythe@usbr.gov)

Dear Ms. Forsythe,

Please accept these comments on behalf of the Grassland Water District and the Grassland Resource Conservation District (GWD) regarding the draft agreement (Agreement) between the United States and the Pacheco Water District, Panoche Water District, and San Luis Water District (collectively referred to as the Northerly Districts) concerning the collection and management of subsurface agricultural drainage water.

GWD's primary interest is to ensure that the Agreement, along with the related settlement agreement with Westlands Water District and any enabling legislation, will not cause foreseeable adverse impacts to the Central Valley Project Improvement Act (CVPIA) wildlife refuge areas and federal refuge contractors that are adjacent to the Northerly Districts have a history of adverse drainage effects: Grassland Resource Conservation District, San Luis National Wildlife Refuge (San Luis, West Bear Creek, Freitas, and Kesterson Units), North Grasslands Wildlife Area (Gadwall, Salt Slough, China Island Units), and the Los Banos Wildlife Area.

Soil and water quality on these refuges is protected by the operation and maintenance of the lower San Luis Drain and the Grasslands Bypass Project.

## **I. BACKGROUND**

### **A. History of Drainage in the Grasslands**

The Bureau of Reclamation's (Reclamation) initial Feasibility Report for the San Luis Unit of the CVP noted that fish and wildlife were to be protected from the adverse affects of constructing and operating the Unit. Studies conducted in the 1960's by the U.S. Fish and Wildlife Service (USFWS), California Department of Fish and Game (CDFW), and California Department of Water Resources warned that contaminants in drain water from the Unit would not be suitable for wildlife.

CVP irrigation service to the San Luis Unit began in 1968. In 1972, the United States began conveying agricultural drain water from Westlands Water District through the San Luis Drain to Kesterson Reservoir within the Kesterson Unit of the San Luis National Wildlife Refuge. The United States did not complete the planned segment of the San Luis Drain from Kesterson Reservoir to the Delta, and in 1975 the reservoir was converted to a terminal holding reservoir that stored agricultural drain water.

By 1981, Kesterson Reservoir was at capacity, and fish, vegetation and wildlife had declined. The last species of fish to survive within the refuge had the highest levels of selenium ever recorded in living fish. Surveys in 1983 revealed high levels of selenium and dead, dying, and deformed bird embryos and chicks suffering from acute selenium poisoning. With pressure from Congress and the threat of a lawsuit under the Migratory Bird Treaty Act, the Kesterson Reservoir, San Luis Drain, and Westlands drainage system were shut down from 1985 to 1986.

For 30 years before the shutdown of Kesterson Reservoir, GWD contracted with nearby water districts to accept agricultural drain water for wetland use. In 1984, surveys by the USFWS, U.S. Geological Service, and CDFW found high levels of selenium in plants, fish and birds within GWD. GWD stopped accepting drain water from adjacent districts and began re-routing that water through its canals and sloughs in order to reduce infiltration to the wetlands. This impaired GWD's ability to deliver wetland water supplies both within GWD and to other refuges.

In 1990, the first drainage management plan for the San Joaquin Valley Drainage Program was issued, recommending source control, reuse of drainage

water on salt-tolerant plants, land retirement, and regulated discharges to the San Joaquin River to avoid adverse impacts on wetlands.<sup>1</sup>

**B. The Western Regional Drainage Plan and In-Valley/Water Needs Land Retirement Alternative**

The 1990 drainage management plan was again examined in a 2000 report for the San Joaquin Valley Drainage Implementation Program. In 2003, Reclamation issued a San Luis Drainage Feature Re-Evaluation Report, and the agricultural water districts issued the Westside Regional Drainage Plan (WRDP), which contemplated a significant reduction in drain water discharges by 2009. Reclamation approved an approach similar to the WRDP when it adopted its Record of Decision (ROD) for the In-Valley/Water Needs Land Retirement Alternative in 2007. The ROD committed Reclamation to implementing avoidance, minimization, and mitigation measures, many of which were intended to reduce and avoid adverse effects on wildlife and wildlife habitats.

Under the WRDP and the ROD, the Grassland Drainage Area, located adjacent to and upslope from CVPIA refuges including the GRCD, uses source control, water reuse, and the treatment of drain water to reduce drainage discharges to refuges and the San Joaquin River. This includes the Grassland Bypass Project (GBP), which is designed to improve water quality within the refuge water delivery canals by actively managing and consolidating agricultural drain water into the earthen Grassland Bypass Channel and then into the lower San Luis Drain before discharging to the San Joaquin River. It also includes the San Joaquin River Water Quality Improvement Project (SJRIP), which collects and reuses drain water on salt tolerant crops in a reuse area that is adjacent to and upslope from GWD. The size of the reuse area continues to expand.

The GBP and SJRIP are the primary methods of handling drain water from adjacent districts, because water treatment technology has not yet proven feasible at the required scale. A principle challenge for both the GBP and SJRIP are storm events, which mobilize drain water and sediments.

**C. Third Use Agreement for the San Luis Drain**

The United States owns the lower San Luis Drain. The operation and maintenance of the lower drain are governed by the Third Use Agreement with the San Luis and Delta Mendota Water Authority (the Authority), which expires in

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<sup>1</sup> Phillip Garone, *The Fall and Rise of the Wetlands of California's Great Central Valley*, Chapter 9, "Tragedy at Kesterson Reservoir" (2001).

2019. Under the Third Use Agreement, the owners of lands that historically drained into the channels that provide water to wetland habitat within GWD and state and federal refuges are responsible for paying for the costs of operating and maintaining the lower San Luis Drain as a wetland bypass channel.<sup>2</sup> The Third Use Agreement acknowledges that: (1) Even after drain water discharges cease, the lower San Luis Drain must continue to be used for uncontrolled stormwater events that would otherwise cause damage to wetlands; and (2) Reclamation and the Authority shall bear responsibility for removing the significant quantities of sediment accumulated in the drain. Excerpts from the Third Use Agreement include the following:

“Even with full implementation of the Westside Regional Drainage Plan, the Draining Parties expect that high rainfall events occasionally will create drainage flows that cannot be controlled by the Draining Parties, and it is the intention and objective of the Authority in coordination with Reclamation to develop, beginning no later than Year Seven (2016), a long-term stormwater management program. Development of such program may include the evaluation of utilizing a portion of the San Luis Drain to bypass stormwater flows around some wetland areas, in order to minimize the impact of such flows.

...

“No later than Year Seven (2016), the Draining Parties shall begin developing a long-term stormwater management plan, which may include evaluation of utilizing the San Luis Drain to bypass stormwater flows around some wetland areas.

...

“Reclamation, in its discretion, shall, at any time during the term of this Agreement, have the option of either removing the sediment and organic materials now deposited in the Drain, or, of delegating this responsibility to the Authority. . . . In any event, unless directed otherwise by Reclamation, the Authority shall be responsible for the management, removal and disposal, at its own and sole expense, of all sediment, organic materials and other substances accumulating in the Drain as a result of its use of the Drain pursuant to the First Use Agreement, the 2001 Use Agreement, and this Agreement. Any costs incurred by either Reclamation or the Authority for the management, removal and disposal of the sediment and other materials in the Drain shall be apportioned between Reclamation and the Authority on the basis of the total volume of materials and the total concentration of

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<sup>2</sup> Third Use Agreement, Articles I.D and VI.D.

contaminants in those materials in the Drain attributable to each party's use of the Drain.

...

"The Draining Parties, in coordination with Reclamation, shall develop a Sediment Management Plan consistent with this Agreement."<sup>3</sup>

The monitoring reports and other reports for the GPB and SJRIP describe how storm events continue to pose a problem for the mobilization of drain water and sediment. As described in a December 17, 2015 letter report from the Authority to the Central Valley Regional Water Quality Control Board (CVRWQCB):

"The issue of high drainage flows caused by major storm events continues to be a concern. The 2010-2019 Use Agreement . . . describes a planning process that may evaluate the utilization of a portion of the San Luis Drain to bypass storm water flows around some wetland areas after 2019, in order to minimize the impact of such flows. Under the Use Agreement, development of a formal plan must begin no later than 2016."

GWD is informed of the following issues of concern regarding implementation of the WRDP, the ROD, and the Third Use Agreement, and believes these concerns should be addressed as part of the proposed Agreement, the Westlands settlement agreement, and the enabling legislation: (1) The stormwater management plan for the lower San Luis Drain has not been updated for 20 years, and there is no concrete timeline for doing so; (2) There is no written plan for the removal of sediment from the drain, nor has any allocation of costs been made between Reclamation and the Authority for sediment removal; (3) Sediment removal is currently governed only by land disposal permits issued by the Central Valley Regional Water Quality Control Board, without Reclamation involvement; (4) Disposal of sediments is taking place in the SJRIP drainage reuse area, located upstream from GWD and other refuges, without Reclamation involvement and without an analysis of how this practice may increase salt, selenium, and other constituents of concern in soil, groundwater, and stormwater; (5) Mitigation fees collected under the Third Use Agreement have not been expended; and (6) Reclamation has no plan for the future use and management of the San Luis Drain upon expiration of the Third Use Agreement in 2019.

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<sup>3</sup> Third Use Agreement, Recital G and Articles III.D and III.G.

## **II. OBLIGATIONS OF THE UNITED STATES TO PREVENT DETERIORATION OF THE GRASSLANDS ECOLOGICAL AREA**

Multiple CVPIA refuges make up the 240,000-acre Grasslands Ecological Area (GEA), which contains remnant native grasslands and wetlands that have never been used for agricultural purposes. These refuges form the largest contiguous freshwater wetland complex within California and west of the Rocky Mountains, encompassing approximately one third of California's remaining wetlands. The GEA hosts millions of migratory birds and shorebirds each year (it is designated as an integral unit of the Western Hemispheric Shorebird Reserve Network<sup>4</sup>), as well as a diverse resident population of wildlife, including many species that are listed as threatened and endangered. The following describes only a few of the United States' responsibilities to protect the GEA under law, contract, and international treaty.

The GEA is on the List of Wetlands of International Importance under the Ramsar Convention on Wetlands, one of only 38 listed Ramsar Sites within the United States.<sup>5</sup> The United States designated the GEA as a Ramsar Site because of its suitability and importance, with consideration for the United States' "international responsibilities for the conservation, management and wise use of migratory stocks of waterfowl."<sup>6</sup> As a signatory party to the Ramsar Convention, the United States agreed to "formulate and implement" its planning processes "so as to promote the conservation of the wetlands included on the List," and to inform the International Union for Conservation of Nature and Natural Resources if the ecological character of the GEA "has changed, is changing or is likely to change" as a result of technological developments, pollution or other human interference.<sup>7</sup>

Under the current Ramsar Convention Strategic Plan, the United States committed to help prevent degradation of the GEA due to changes in land use that override environmental considerations, and to maintain the ecological character of the GEA through effective planning and integrated management, full and effective participation of wetland stakeholders in planning processes, and recognition that the GEA must be viewed from a basin or ecosystem perspective as part of a wider water cycle.<sup>8</sup> These commitments help achieve not only the goals of the Ramsar

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<sup>4</sup> <http://www.whsrn.org/site-profile/grasslands>

<sup>5</sup> <http://www.ramsar.org/grassland-ecological-area>

<sup>6</sup> Ramsar Convention, Article 2, *available at*:

[http://www.ramsar.org/sites/default/files/documents/library/scan\\_certified\\_e.pdf](http://www.ramsar.org/sites/default/files/documents/library/scan_certified_e.pdf)

<sup>7</sup> Ramsar Convention, Articles 3 and 8.

<sup>8</sup> Ramsar Convention 4th Strategic Plan 2016-2024, pp. 6, 9-10, *available at*:

[http://www.ramsar.org/sites/default/files/documents/library/4th\\_strategic\\_plan\\_2016\\_2024\\_e.pdf](http://www.ramsar.org/sites/default/files/documents/library/4th_strategic_plan_2016_2024_e.pdf)

Convention but other Multilateral Environmental Agreements including the Convention on Biological Diversity, the Convention on Migratory Species, and the UN Framework Convention on Climate Change.<sup>9</sup>

The United States is also a signatory party to the 1986 North American Waterfowl Management Plan.<sup>10</sup> The basic principles of this treaty include that the “maintenance of abundant waterfowl populations is dependent on the protection, restoration and management of habitat,” that “persistent loss of important waterfowl habitat should be reversed,” and that joint ventures of private and governmental organizations should be convened to consider “projects of international concern that can only be addressed through a pooling of resources.” The Central Valley Joint Venture was formed pursuant to this treaty.

The CVPIA designates the GEA refuges as habitat mitigation areas for the Central Valley Project (CVP).<sup>11</sup> Under the CVPIA, the GEA refuges are to serve as “replacement” habitat intended to be “equivalent” in ecological integrity to the natural wetlands that were lost due to the construction, operation, and maintenance of the CVP.<sup>12</sup> The CVPIA requires that water delivered to the GEA refuges must be of “suitable quality” for refuge purposes.<sup>13</sup> Reclamation must administer all new and existing contracts in compliance with these requirements.<sup>14</sup>

Under the CVPIA refuge water supply contracts executed by the United States with GWD, CDFW, and USFWS, the United States is not under an obligation to provide drainage services to refuge contractors for refuge water supplies delivered under those contracts. However, the United States is under an obligation to ensure that water delivered under the contracts is “of suitable quality to maintain and improve wetland habitat areas,” and is also obligated to operate and maintain its CVP facilities “to maintain the quality” of water delivered to refuges.<sup>15</sup>

### **III. COMMENTS ON THE PROPOSED DRAINAGE AGREEMENT**

GWD will be directly affected by the Agreement and implementing legislation. The San Luis Drain, which historically conveyed most of the drain water from adjacent agricultural districts and which currently conveys some drain water as well as stormwater from those districts, runs for approximately 27 miles through

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<sup>9</sup> Ramsar Convention 4th Strategic Plan 2016-2024, p. 4.

<sup>10</sup> <http://www.fws.gov/birdhabitat/NAWMP/index.shtm>.

<sup>11</sup> Public Law 102-575, Title 34, § 3406(a).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* § 3406(d).

<sup>14</sup> *Id.* § 3404(c)(2).

<sup>15</sup> Refuge Water Supply Contracts, Article 12.

GWD and the surrounding GEA. The Drain plays an important role in protecting wetland water quality by redirecting drain water, agricultural return flows, shallow groundwater, and stormwater from upland CVP agricultural lands.

Water that is not directed into the San Luis Drain enters GWD through the Agatha and Camp 13 Canals. These canals are connected to the refuge water delivery system and are used to convey CVP refuge water supplies. The future use, remediation, and management of the San Luis Drain, in addition to the upland drainage reuse area, is a significant concern for GWD and surrounding habitat managers. GWD has the following comments on the Agreement:

**A. Enabling Legislation Not Provided**

Article 3 of the Agreement acknowledges that all obligations under the Agreement are contingent upon the enactment of “Enabling Legislation,” which will alter federal law with respect to the provision of drainage service to the San Luis Unit, and may have profound impacts on the GEA and other contractors, water managers, and landowners. The Enabling Legislation is a “material and essential” component of the Agreement.<sup>16</sup> However, the Enabling Legislation, purportedly attached as Attachment 1 to the Agreement, is not provided for public review and comment.

GWD cannot meaningfully comment on the Agreement without knowing the scope, content, and language of Attachment 1. The Enabling Legislation must not change the obligations of the United States or the contracting districts to protect wetland water quality or to operate and maintain the San Luis Drain to protect the GEA wetlands from low quality stormwater and other water flows. In fact, the Enabling Legislation should provide express protections and include proactive solutions for ongoing water quality and sediment management.

**B. Stormwater Provisions Too Broad, and Need for Sediment Removal Ignored**

Large storm events are common in California and the San Joaquin Valley, and are not “extraordinary.” The Authority and the United States have repeatedly acknowledged in written reports that predictable storm events pose problems for containing salt- and mineral-laden drain water and similar runoff from the drainage reuse area and surrounding CVP agricultural districts. These problems could be addressed in a number of ways to protect wetland soils and water quality, including but not limited to the enlargement of existing stormwater conveyance channels, removal of sediment from stormwater conveyance channels, construction of new stormwater conveyances, installation of sediment controls, and construction or improvement of flood control facilities.

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<sup>16</sup> Proposed Agreement, Section 3(a).



Several provisions in the Agreement are inaccurate and far too broad in describing the future management and responsibilities for stormwater. In addition, the Agreement makes absolutely no mention of sediment removal from the San Luis Drain, despite the fact that the Third Use Agreement contemplates a shared allocation of costs for sediment removal between Reclamation and those using the San Luis Drain. The Agreement must be revised as follows:

**Section 5(a)(i):** “The Northerly Districts agree that they, and not the United States, are responsible for the management of drainage water within their respective boundaries, in accordance with state and federal law, and at their sole expense, except as provided under the terms of this agreement, ~~and sole liability~~; provided, that the Northerly Districts’ responsibility to manage drainage water within their respective boundaries under this Agreement shall not extend to drainage water resulting from storm events or ~~other~~ extraordinary events outside the Districts’ control.”<sup>17</sup>

**Section 5(a)(ii):** “The Northerly Districts subject thereto and Reclamation shall remain subject to existing regulatory oversight, ~~and~~ enforcement mechanisms, and obligations under the current Third Use Agreement through December 31, 2019, which include potential termination of the right to utilize the San Luis Drain for the conveyance of drainage benefitting the Northerly Districts, incentive fees for failure to meet specified load targets, stormwater management and sediment removal requirements, and mitigation fees that encourage reducing drainage to zero discharge before the end of the Use Agreement, and the parties shall also be subject to any future Use Agreement for the San Luis Drain. The existing Waste Discharge Requirements issued by the Regional Board also include prohibitions of discharge and potential financial liability for non-compliance during the term of the current Use Agreement and require demonstration that any significant environmental impacts associated with continued operation of the Grasslands Bypass Project, including use of the San Luis Drain after December 31, 2019, have been analyzed under applicable statutes and are in compliance with the Endangered Species Act.

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<sup>17</sup> The quoted language from Section 5(a) of the Agreement is currently styled only as future contractual language, yet it is written so as to refer to the Agreement and to obligations that should properly be part of the Agreement. Sections 5(a)(i) and (a)(ii) should be revised to indicate that its provisions are not merely future contractual language but are also obligations under the Agreement itself.

**Section 9(a):** “The Northerly Districts and Reclamation have an interest in the operation, maintenance and use of the San Luis Drain after 2019 to convey storm water runoff as a means to reduce the quantity of such runoff flowing into wetland delivery channels. In accordance with the Third Use Agreement, beginning no later than 2016 Reclamation and the Northerly Districts agree to ~~attempt to~~ negotiate a new “Stormwater Use Agreement” that would take effect immediately following expiration of the Third Use Agreement, and a written Sediment Removal Plan that will be implemented as soon as practicable. The parties intend that a Stormwater Use Agreement ~~would and~~ Sediment Removal Plan will be negotiated in consultation with other districts and landowners that are adjacent to the San Luis Drain, and will address operation, maintenance and use of that segment of the San Luis Drain currently used by the GBP after the expiration of the Third Use Agreement, including the parties’ Northerly Districts’ responsibilities for all environmental permitting requirements, monitoring and technological requirements, and liability that may be associated with future operation or discharges from that segment of the San Luis Drain.”

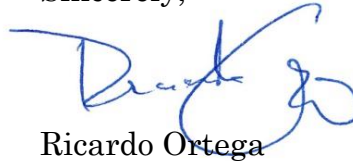
**C. Transfer of Ownership of the Lower San Luis Drain Unlikely**

Section 9(b) of the Agreement states that the Secretary of the Interior “shall” transfer title to the lower San Luis Drain to a willing entity. No such entity has been identified, and it is likely that the United States will retain title to that portion of the Drain for the foreseeable future, and will continue to use the Drain for stormwater and other water conveyance purposes to protect wetland soils and water quality. This section should be revised as follows:

**Section 9(b):** “Upon enactment of the Enabling Legislation, the Secretary shall in coordination with the Northerly Districts seek to transfer title to a willing entity for the portion of the San Luis Drain from Milepost 105.72, Check 19 (near Russell Avenue) to Milepost 78.5 (Mud Slough) to an entity or party other than the United States. The San Luis Drain shall continue to be used and maintained for authorized water conveyance purposes.

On behalf of the Grassland Water District, the Grassland Resource Conservation District, and the Grassland Ecological Area, thank you for considering and addressing the concerns of GWD and the proposed revisions to the Agreement provided in these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Ricardo Ortega', with a stylized flourish at the end.

Ricardo Ortega  
General Manager,  
Director of Policy &  
Governmental Affairs